

**IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA**

(CORAM: MKUYE, J.A., KOROSSO, J.A. And MAKUNGU, J.A.)

CIVIL APPEAL NO. 128 OF 2020

TANZANIA POSTS CORPORATION APPELLANT

VERSUS

SALEHE KOMBA 1ST RESPONDENT

REVOCATUS RUKONGE 2ND RESPONDENT

**(Appeal from the Proceedings, Ruling and Drawn Order of the High Court of
Tanzania at Mwanza)**

(Rumanyika, J.)

dated the 6th day of September, 2019

in

Revision No. 59 of 2018

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JUDGMENT OF THE COURT

18th August & 20th September, 2023

KOROSSO, J.A.:

Tanzania Posts Corporation, the appellant herein, was aggrieved by the proceedings and decision of the High Court sitting at Mwanza dismissing Revision No. 59 of 2018 which arose from a Labour Dispute No. CMA/MZ/ARB/100-101/2017 that the respondents had successfully instituted at the Commission for Mediation and Arbitration (CMA). In the labour dispute at the CMA, the respondents claimed that the appellant had unfairly terminated them from employment without giving them an

opportunity to be heard and as a result, they suffered psychological injuries, and thus each claimed compensation of Tshs. 150,000,000/=.

The facts that impelled the respondents to institute the labour dispute against the appellant as discerned from the evidence adduced at the CMA is that the respondents' employment with the appellant started in 1997 and 2000 respectively as part-time drivers with Standard Seven and Vocational Training driving certificates. On 30/11/2007, each respondent was given a permanent contract, for the 1st respondent it was vide a letter with reference MHR/PF 00805/2007 admitted as exhibit P1 and for the 2nd respondent it was vide a letter with reference MHR/PF 00804/2007 admitted as exhibit P3. On 2/8/2017 each of the respondents was served with a termination letter dated 27/7/2017. The letters admitted as exhibits P2 and P4 indicated that the termination was as of 25/7/2017 and that the respondents were removed from the payroll. When the respondents queried the reasons for their termination, they were informed that the termination arose from a Government Notice of 2004 requiring employees to have academic qualifications of at least Form IV level which they did not possess. The respondents' complaints were that they were terminated without being heard and without the appellant having consulted with TEWUTA and COTWU, their unions, on the issue in question.

At the CMA, the matter proceeded *ex parte* on allegations that the appellant failed to file an opening statement despite being issued requisite summons to appear before it. The respondents denied such assertions for lack of proof of service of the summons to appear. In the end, the matter was ruled in favour of the respondents by the arbitrator who ordered the appellant to reinstate the respondents in terms of section 40(1)(a) of the Employment and Labour Relations Act (the ELRA). The appellant's application to set aside the decision of the Arbitrator was dismissed for failure to provide sufficient reasons for non-appearance. As alluded to above, dissatisfied with the decision, the appellant's Revision application to the High Court was unsuccessful. The High Court Judge dismissed the application, set aside the award of reinstatement of the respondents and ordered compensation of twelve months' salaries, severance allowance, repatriation allowance, subsistence allowance and other statutory dues.

It is the decision of the High Court that prompted the current appeal to the Court, and the appellant armed with two memoranda lodged on 16/3/2020 and 18/2/2022 with a total of six grounds of appeal which for reasons to be revealed as we proceed, we shall not reproduce at this juncture.

When the appeal was called for hearing on 18/8/2023, the appellant was represented by Mr. Lameck Merumba, learned Senior State Attorney

assisted by Mr. George Kalenda and Stanley Mahenge, learned State Attorneys. Messrs. Salehe Komba and Revocatus Rukonge, the 1st and 2nd respondents, entered appearance, unrepresented. Both parties prayed to adopt their written statements filed under rules 106(1) and 106(8) of the Tanzania Court of Appeal Rules, 2009 (the Rules) respectively, to form part of their oral submissions.

At the inception of the hearing, Mr. Kalenda who took the lead in submitting for the appellant, onset, sought and was granted leave of the Court to abandon the supplementary/additional grounds of appeal filed on 18/2/2022 and also grounds no. (iii) and (iv) from the memorandum of appeal filed on 16/3/2020. In consequence, the grounds that remained to be argued were grounds (i) and (ii) stating thus:

- (i) The Honourable Court erred in law by entertaining the matter emanating from CMA which had no jurisdiction to entertain a matter involving a public servant.*
- (ii) The Honourable Court erred in law and fact by awarding remedies to the respondents out of context as were not pleaded in their respective pleadings.*

In amplifying the grounds of appeal, regarding ground one, Mr. Kalenda implored the Court to find that the CMA had no jurisdiction to hear and determine the complaints by the respondents in CMA/MZ/ARB/100-101/2017 since the respondents, as employees of the appellant are

invariably, public servants. In expounding this argument, the learned State Attorney proceeded to define the word "jurisdiction" by essentially adopting the definition found in the case of **Tanzania Revenue Authority v. Tango Transport Company Ltd**, Civil Appeal No. 84 of 2009 (unreported). He contended that in that case, apart from adopting the definition of jurisdiction from the Halsbury Laws of England, Vol. 10, para 314, the Court held that the question of jurisdiction can be raised by either party or *suo motu* by the Court at any time even on appeal. He thus prayed the Court to consider the question of the jurisdiction of the CMA in this case even though it has been raised at the appeal level.

The learned State Attorney argued that by the nature of their employment, the respondents are public servants and then traversed us on a journey to comprehend what the term "a public servant" connotes. He submitted that it is defined under section 3 of the Public Service Act Cap 298 (the Public Service Act) and also in the case of **Tanzania Posts Corporation v. Domina A. Kaiangi**, Civil Appeal No. 12 of 2022 (unreported) that, "*a public servant shall, prior to seeking remedies provided for in labour laws, exhaust all remedies as provided for under this Act*".

According to the learned State Attorney, in the cited case, the Court, in addition, proceeded to hold that Tanzania Posts Corporation is a public

service institution and that the CMA can therefore not entertain a labour dispute from an employee of the appellant, who is a public servant. He submitted further that although section 2 of the ELRA recognizes public service and its employers, the provision should be read with section 32A of the Public Service Act, which requires a public servant to exhaust local remedies first. The local remedies envisaged under section 32A of the Public Service Act he argued, include exhaustion of available disciplinary mechanisms within the appellant company, including where dissatisfied with termination, to appeal to the Chief Executive Officer of the appellant company, if still dissatisfied, appeal to the Board of Directors of the Company, then, the Commission for Civil Service, then, appeal to the President of the United Republic of Tanzania. If still dissatisfied, proceed to seek judicial review in the High Court of Tanzania.

The learned State Attorney contended further that when the provisions of the Public Service Act cited above and the holding of the Court in the case of **Tanzania Posts Corporation v. Domina A. Kalangi** (supra), clearly the CMA has no jurisdiction to entertain labour disputes involving public servants. A position that, he contended, has been restated in other decisions of the Court including the case of **Tanzania Posts Corporation v.**

Jeremiah Mwandi, Civil Appeal No. 474 of 2020 (unreported) and which we are constrained to follow.

According to Mr. Kalenda, since in the instant case the CMA heard and determined the labour dispute initiated by the respondents, who were employees of the appellant, a public corporation, it follows that the respondents are public servants, and consequently, the CMA had no jurisdiction to entertain the said labour dispute which is subject to the instant appeal. He argued that there was no evidence that the respondents had undertaken any of the available internal remedies after receiving letters of termination. Which, he reflected, was not proceeding accordingly, as provided in the case of **Attorney General v. Tanzania Port Authority and Another**, Civil Application No. 87 of 2016 (unreported). He thus prayed that the Court quash and set aside the proceedings and judgment and the commensurate award granted by the CMA and confirmed by the High Court, find the ground meritorious and allow the appeal.

In response to the question of lack of jurisdiction on the part of the trial tribunal, in their oral submissions, the 1st and 2nd respondents had nothing substantive in response, except through the 2nd respondent prayed for the Court to consider the written submissions filed. He further insisted that the legal provisions and authorities cited advancing that the CMA had

no jurisdiction to entertain the matter came after 2017 when their case had already been lodged, thus, application of the said position to the instant case would surmount to a retrospective application and prejudicial to their rights. He also challenged the holdings in the case cited arguing that both of them dealt with senior-level officers of the corporation and thus determination of their status as public servants did not apply to those who are employed as drivers, like them.

In the written submissions, the respondents question reasons for the appellant's bringing the issue of jurisdiction of CMA at this stage of appeal and without notice. The respondents argue that since it was not an issue addressed in the High Court in the revision proceedings then the Court should not deliberate on it. They further contend that section 2(1) of the ELRA outlines who are not covered by the Act and those excluded therein are members of the armed forces, police force, prisons service and national service. That employees of parastatal organizations are not among those to which the Act does not apply. They further contended that the amendments of the ELRA of 2018 did not change the said provision and that under section 3 of the Public Service Act, a public servant is one who holds or is acting in a public service office.

According to the respondents, taking into account how the said Act defines a public service office the Tanzania Posts Corporation does not fall within those prescribed therein since it is established under a written law, the Tanzania Posts Corporation Act. Therefore, it means they contended, that the respondents are not public servants and essentially not bound by the disciplinary procedures found in the Public Service Act. On that account they argued, section 14(2)(a) and (b) confers the CMA with jurisdiction to entertain labour disputes like theirs. It was thus the respondents' contention that the CMA and the Labour Court had full powers to determine the matter and thus prayed the Court to find ground one of appeal unmerited.

In rejoinder, Mr. Kalenda reiterated his submission in chief and disputed the argument that at the time of the respondents' termination, employees of parastatal institutions and public corporations were not recognized as public servants.

Having heard the submissions by the parties, we think it is important to start by addressing the concern raised by the respondents on whether the CMA had jurisdiction to entertain the labour dispute subject of the current appeal. It is well settled that points of law, especially on jurisdiction and limitation may be raised at any time. This position has been amply discussed in various cases including **Anwar Z. Mohamed v. Said**

Selemani Masuka, Civil Reference No. 18 of 1997, **Michael Leseni Kweka v. John Eliafe**, Civil Appeal No. 51 of 1997 (both unreported) and **Tanzania Revenue Authority v. Tango** (supra). In the latter decision, the Court held:

"... a question of jurisdiction can be belatedly raised and canvassed even on appeal by the parties or the court suo motu, as it goes to the root of the trial."

The above being the position, we agree with the learned State Attorney that the Court may proceed to determine a question of jurisdiction even at the appeal stage and we shall thus proceed to determine as raised in ground one.

It has been submitted by the learned State Attorney that the CMA had no jurisdiction to entertain the labour dispute giving rise to the instant appeal for the reason that the respondents are public servants. That, this was not in compliance with the provisions of section 32A of the Public Service Act, a contention adamantly refuted by the respondents. Section 32A of the Public Service Act provides thus:

"A public servant shall, prior to seeking remedies provided for in the labour laws, exhaust all remedies as provided under the Act"

On the rival side, the respondents argued that it was proper to file the case in the CMA by virtue of section 2 of ELRA applicable to all employees including those in the public service of the Government and only excludes members of the Tanzania Peoples Defence Forces, the Police Force, the Prisons Services or the National Service.

At this juncture, we find it pertinent for our purpose, to strive for a better understanding of who are public servants and available disciplinary mechanisms to undertake where a labour dispute like the one subject to the instant appeal ensues. Section 4 of the Interpretation of Laws Act (the ILA) states:

"Public officer" or "public department" extends to and includes every officer or department invested with or performing duties of a public nature, whether under the immediate control of the President or not, and includes an officer or department under the control of a local authority, the Community, or a public corporation".

In the circumstances, taking the definitions from the above passage and the contents of section 3 of the Public Service Act, together with the essence of section 2 of ELRA reproduced hereinabove, it is clear that section 2 of ELRA must be read together with section 32A of the Public Service Act, which was introduced in 2016 by the Written Laws (Miscellaneous

Amendments) (No.3) Act, 2016. Section 32A also reproduced hereinabove, impels a public servant to exhaust the remedies available under the Public Service Act before seeking remedies provided by labour laws.

Indeed, the Court has deliberated on the issue of the disciplinary processes to undertake for employees in the public service in the cases of **Tanzania Posts Corporation v. Dominic A. Kalangi** (supra) and **Tanzania Posts Corporation v. Jeremiah Mwandu** (supra). In the first case we held:

"...the import of the above-quoted provisions together with a more elaborate exposition attached to it, is that the employees of the Tanzania Posts Corporation are public servants.

While section 31(1) of the Public Service Act, provides for the servants in the executive Agencies and Government institutions, such as the Tanzania Postal Corporation, to be governed by the provisions of the laws establishing the respective executive agency or institution, subsection (2) makes it mandatory thus:

"Without prejudice to sub-subsection (1), public servants referred to under this section shall also be governed by the provisions of this Act.

In the context, of the instant case, the CMA is further kept at bay from entertaining labour disputes involving public servants by the provisions of section 32A"

In both cases, the Court went on to hold that the respondents who were employees of the Tanzania Posts Corporation are public servants being employed in a public office. It was also observed that upon their termination and exhausting of internal remedies in the appellant's corporation, it is then that the provisions of section 25(1)(a) and (b) of the Public Service Act would have come into play since as stipulated, all disciplinary matters or disputes involving public servants are exclusively with the domain of the Public Service Commission whose decision is appealable to the President.

We are constrained to apply the above findings and observation to the instant appeal where the respondents are also employees of the Tanzania Posts Corporation, held in the cases above to be providing public service and thus its employees to be public servants. It suffices that, as stated by the learned State Attorney, the legal provisions cited do not have a demarcation in terms of the strata of employees, all are public servants regardless of different designations and hierarchy. We thus find the arguments by the respondents that the provisions do not apply to them, as drivers, is in essence, misconceived.

We are alive to other disciplinary measures within the appellant's company regulated by staff regulations titled **Shirika La Posta Tanzania, Kanuni za Utumishi wa Shirika, Toleo la Nne**. The Rules provide for employees of the appellant, complaints procedure to undertake where one feels aggrieved with the decision of the disciplinary committee, which is according to Rule F4 is to apply to the Postmaster General, if still aggrieved to proceed accordingly as specified by the Rules.

In this appeal, our scrutiny of the record of appeal has shown that there was no attempt by the respondents to go through the disciplinary mechanisms within the corporation as specified in the respective Rules, nor those within the provisions of the Public Service Act, required for public servants. Therefore, ground one has substance.

For the foregoing, we are of the view that the CMA had no jurisdiction to entertain the dispute between the respondents who are public servants and the appellant. In the event, we find no need to proceed to address the remaining ground of appeal, finding that our deliberations in ground one are sufficient to dispose of the appeal.

In the end, we are of the firm view that the appeal is merited and we thus allow it. In consequence, we quash the proceedings and set aside the

judgment and any consequential thereto orders of the CMA and the High Court. In the circumstances, we make no order as to costs.

DATED at **DAR ES SALAAM** this 14th day of September, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 20th day of September, 2023 in the presence of Mr. Lameck Melumba learned Senior State Attorney for the Appellant, in the presence of 2nd Respondent in person and in absence of 1st Respondent, is hereby certified as a true copy of the original.




C.M. Magesa
DEPUTY REGISTRAR
COURT OF APPEAL